US EPA RECORDS CENTER REGION 5
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Reilly Supplemental Statement
(SFund)

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America,

Plaintiff,

and

State of Minnesota, by its Attorney General Warren Spannaus, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corp.; Housing and Redevelopment Authority of St. Louis Park; Oak Park Village Associates; Rustic Oaks Condominium, Inc., and Philips Investment Co.,

Defendants,

and

City of St. Louis Park,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation,

Defendant,

and

City of Hopkins,

Plaintiff-Intervenor,

vs.

Reilly Tar & Chemical Corporation,

Defendant.

File No. 4-80-469

SUPPLEMENTAL STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT REILLY TAR & CHEMICAL CORPORATION'S MOTION TO DISMISS THE AMENDED COMPLAINT OF PLAINTIFF UNITED STATES OF AMERICA

Introduction

Plaintiff United States of America has filed an Amended Complaint in the above-captioned matter. In addition to reasserting the claims against Reilly Tar & Chemical Corporation ("Reilly") first made in its original Complaint dated September 3, 1980—with some significant omissions to be discussed below—the Amended Complaint asserts claims against Reilly based on the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C.A. §§ 9601 et seq. Specifically, the "Second Claim for Relief", paragraphs 31-39 of the Amended Complaint, is based on § 106(a) of Superfund, 42 U.S.C.A. § 9606(a), and the "Third Claim for Relief", paragraphs 40-45 of the Amended Complaint, is based on § 107(a) of Superfund, 42 U.S.C.A. § 9607(a).

This brief is directed to Reilly's motion to dismiss the Amended Complaint of the United States and is meant to supplement Reilly's principal brief in support of its original motion to dismiss and Reilly's reply brief to the memoranda in opposition already filed by the plaintiff and by intervenor State of Minnesota. Accordingly, the instant brief will address only the newly added Superfund claims asserted by the United States.

Argument

I. The United States' Claim for Reimbursement of Response Costs is Premature

In its Third Claim for Relief, the United States has attempted to plead a claim that Reilly is liable to it for alleged response costs under Superfund. There is serious doubt as to whether such a Superfund claim can ever be validly asserted against Reilly[1/], but wholly apart from such consider-

1/ See Supplemental Statement of Points and Authorities in Support of Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaints of the Intervenors ("Supplemental Brief for Dismissal of Intervenors") at 6 n. 2.

ations, the government's reimbursement claim in the instant suit is prematurely brought and must accordingly be dismissed for failure to state a claim.

The claim of the United States for reimbursement of response costs under Superfund is based in all material respects on the same provisions of Superfund as is the Superfund reimbursement claim recently asserted by intervenor State of Minnesota. In its Supplemental Brief for Dismissal of Intervenors, Reilly has already set forth in detail its position as to why such reimbursement claims based on §§ 107 and 112 of Superfund cannot be validly asserted at this time. Inasmuch as the arguments advanced therein apply to a claim asserted by the United States as well, Reilly herein adopts by reference its Supplemental Brief for Dismissal of Intervenors, particularly pages 5-14 thereof. For the reasons stated therein, the claim of the United States for reimbursement of response costs under Superfund should be dismissed as premature.

II. The United States' Claim Based on § 106 of Superfund also Fails to State a Claim upon which Relief may be Granted

In addition to its claim for reimbursement of response costs, the United States has also alleged § 106 of Superfund as a basis for a claim against Reilly, presumably for injunctive relief. For several reasons, however, the § 106 claim of the United States fails to state a claim upon which relief may be granted and accordingly should be dismissed.

First, the United States has not alleged, and Reilly is not aware of, any authority for it to proceed with an action under § 106 of Superfund. Section 106 specifically states that ". . . the President . . . may

require the Attorney General of the United States to secure" relief through commencement of litigation. § 106(a), 42 U.S.C.A. § 9606(a). It is true that § 115 of Superfund, 42 U.S.C.A. § 9615, authorizes the President "to delegate and assign any duties or powers imposed upon or assigned to him," and that, pursuant to that authority, the President has issued Executive Order No. 12316, 46 Fed. Reg. 42237 (1981). In § 3(b) of that Order, the President delegated the functions vested in him under § 106(a) to the Administrator of the Environmental Protection Agency. But in § 8(b) of the same Order, the President specifically reserved to himself the authority to require the Attorney General to bring suits such as the instant claim based on § 106:

> Notwithstanding any other provision of this Order, the President's authority under the Act to require the Attorney General to commence litigation is retained by the President.

The Amended Complaint fails to allege that the President himself has specifically authorized assertion of the instant § 106 claim. Given the express language of the statute and the above Executive Order, absent such Presidential authorization this claim cannot be asserted and should be dismissed.

Even if the claim asserted under § 106 were an authorized one, it would yet fail to state a claim. By its terms, § 106 is directed only toward relief from a danger or threat constituting "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." As pointed out in Reilly's principal brief and its reply brief with respect to § 7003 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C. § 6973, a substantially similar provision, the "imminent and substantial endangerment"

language makes § 106 strictly an "emergency" provision, to be used only in true emergency situations, and then only to quell the emergency itself.[2/] Were it otherwise, § 106 would swallow up the detailed provisions of the rest of the act, which are concerned with the remedies available for response to chronic pollution problems. Read not in isolation but as part of a whole, the reservation of the § 106 authority for response to true emergencies becomes clear.[3/]

Moreover, § 106 nowhere contains any reference to a standard of liability. The terms "liable" or "liability" do not appear. In this respect also it is similar to § 7003 of RCRA, which, as Reilly contends and several courts have held, is a provision that is jurisdictional only. See Reilly's principal and reply briefs and the authorities cited therein. Indeed, § 106 is even less helpful than RCRA § 7003; § 106 does not even refer to the class of persons who may be liable, let alone provide a definition of that liability.

That federal common law, and not a standard enunciated for other parts of Superfund, is to apply to § 106 also is apparent from the direction given to district courts given jurisdiction by § 106 "to grant such relief . . . as the

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2/ Rather than reiterate its position on this point at length here, Reilly refers the Court to and herein adopts by reference its principal and reply briefs and the sections therein dealing with the emergency nature of RCRA's "imminent and substantial endangerment" provision, § 7003. See Statement of Points and Authorities in Support of Defendant Reilly Tar & Chemical Corporation's Motion to Dismiss the Complaint of Plaintiff United States of America, and Reply Memorandum of Reilly Tar & Chemical Corporation in Response to the Memoranda in Opposition of Plaintiff United States of America and Intervenor State of Minnesota.

3/ That the situation at the St. Louis Park site is not such an emergency has been pointed out by Reilly in its principal and reply briefs, and recent developments underscore this. Two of the wells

equities of the case may require." Superfund § 106(a). Congress undoubtedly could have made its intent much more clear. In its reference to the "equities of the case," however, Congress must have had in mind that historically, pollution litigation would have arisen in the context of a private or public nuisance action in which the plaintiff would have sought injunctive relief under the common law. Unless § 106 was intended to be as broad or broader than all of Superfund, the Court must determine what more limited function § 106 was intended to serve. We submit that it is reasonable to suppose that in enacting § 106 Congress had the same limited intent that it possessed in enacting RCRA § 7003. We suggest that § 106 is jurisdictional only and that the courts must look to equitable common law nuisance principles for the standards of conduct which are to be imposed upon the parties.

Accordingly, as with § 7003 of RCRA, reference must be made to the federal common law for some standard of liability. As Reilly has already pointed out in its principal and reply briefs, there is no federal common law liability for alleged pollution lacking interstate effects, and none have been alleged here. Thus, no § 106 claim against Reilly is possible on the facts alleged.

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originally alleged to have been contaminated now have been recognized as free of contaminants. See Appendix A to Reilly's Motion to Dismiss the Amended Complaint of the United States of America. The Court may also note that the United States in its Amended Complaint has withdrawn several of the apocalyptic allegations made in its original Complaint. It is no longer alleged, as it was originally, that "creosote oil is a demonstrated human . . . carcinogen," that "exposure to high concentration causes . . . death," or that "chronic exposure to PAH compounds has been shown to cause cancer in humans." Cf. Original Complaint at ¶ 13-14.

Conclusion

For all of the foregoing reasons, in addition to those already submitted by Reilly, the Amended Complaint should be dismissed with prejudice in all respects, except for the Third Claim for Relief, which should be dismissed without prejudice, because premature.

Dated:

Respectfully submitted,

DORSEY, WINDHORST, HANNAFORD,
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